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No. 91-1515

In The

Supreme Court of the United States

October Term, 1991

JIMMY CAMPBELL, JIM BOLES, DOUG SANDERS, AND FIRST STATE BANK OF CLEBURNE, TEXAS,

Petitioners,

vs.

JAY BRUMMETT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners claim the following issues should be considered by the Supreme Court. It is the respondent's position that none of them merit review by the Supreme Court.

1. Whether the limitations period applicable to a § 1983 claim premised on "malicious prosecution" begins to accrue only when the underlying criminal proceeding has been terminated in favor of the § 1983 plaintiff?

2. Whether the Civil Rights Act of 1871, 42 U.S.C. § 1983, provides a cause of action for "malicious prosecution"?

3. Whether a 1983 cause of action for malicious prosecution, if any, is coextensive with the same common law tort of "malicious prosecution"?

4. Whether the termination of the underlying criminal proceeding in favor of the § 1983 plaintiff is an essential element of a § 1983 claim premised on "malicious prosecution"?

LIST OF INTERESTED PARTIES

1. The petitioners herein, defendants-appellees below, are Jimmy Campbell, Jim Boles, Douglas Sanders, Dan Boulware, John R. MacLean, First State Bank of Cleburne, Texas, and Johnson County, Texas.

2. The respondent herein, plaintiff-appellant below, is Jay Brummett.

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OPINION BELOW

The November 14, 1991 opinion of the United States Court of Appeals for the Fifth Circuit, reversing the District Court's granting petitioners' motion for summary judgment is reported at 946 F.2d 1178. The June 4, 1990 and August 8, 1990 orders

of the United States District Court for the Northern District of Texas, from which the appeal was taken, are reprinted as an appendix to petitioners' brief pages A-13 through A-37.

STATEMENT OF JURISDICTION

Jurisdiction requisites are adequately set forth in the petition. However, because the only question that affected the petitioners' position in this case was when a cause of action for malicious prosecution accrues, respondent believes there is no jurisdiction for the Supreme Court to consider anything save the issue of when the statute of limitations accrues on a claim of malicious prosecution.

COUNTERSTATEMENT OF THE CASE

Much of the petitioners' statement of the case is a recitation of the evidence they asserted in the District Court in support of their motion for summary judgment. Reliance or reference to their summary evidence is improper because neither the District Court nor the Court of Appeals for the Fifth Circuit reached or considered any issue except the date upon which a claim of malicious prosecution accrues. In light of this respondent believes the plaintiffs' complaint (and his evidence) should be the primary source for any factual recitation of the facts of this case. (Brummett also presented evidence that supports the following statement of the case.)

At all material times relevant to this matter, Jay Brummett lived and resided in Cleburne, Johnson County, Texas, where he owned and operated a small business, bearing the name "Stereo Center". His business was a retail outlet for the sale of stereo equipment for home, office or automobile use. On January 11, 1982, respondent borrowed the sum of $33,445.80 from the First State Bank of Cleburne, Texas, and executed a promissory note

for this sum in favor of the Bank. As collateral for this note, respondent pledged the inventory in his stereo center business. The note provided that respondent was to repay the note in 42 equal installments, due on the 17th day of each month.

Brummett made timely payments until February 17, 1983. On this occasion he called (petitioner) Doug Sanders, a vice president and loan officer with the First State Bank (hereinafter referred to as Bank) and told him that because of poor business conditions he would be unable to make his payment. Sanders told him to wait 10 days and then call him. Ten days later Brummett again reported his inability to pay but Sanders said to wait until the due date in March and contact him. In March, 1983, respondent told Sanders that his financial situation had deteriorated to the point he would have to close his business. Brummett reported that he was behind with suppliers, bills, etc. In the company of the Bank's collections officer Jim Boles, Sanders visited respondent's store in March, 1983. At this meeting Brummett explained to Sanders and Boles that he had sold most of his inventory over the last several months in the normal course of business. Brummett had gradually decreased his inventory during 1982 and early 1983. He accomplished this by not replacing hard to sell items and reordering smaller quantities. Financial conditions forced Brummett to close the "Stereo Center" the first week in April, 1983. (No one on behalf of the Bank had ever requested Brummett to make reports to them relative to his inventory or financial status. It was understood and contemplated by the Bank that Brummett would in the ordinary course of business sell his inventory to the public.)

In April, 1983, petitioner Sanders called Brummett and asked if he could get his family to sign a new note. Brummett told him that could not be done as he had no way to repay the note. Shortly thereafter Sanders called again and again asked Brummett and his wife to sign a new note. Brummett explained to Sanders that

his financial condition was terrible and he and his wife were contemplating bankruptcy. Sanders then demanded payment in full including interest. Sanders said that he would not be responsible for the consequences of Brummett's failure to comply with this demand.

On May 13, 1983, Brummett received a letter from the Bank's lawyer, demanding payment of the total balance of the note, $17,989.93, in ten days. On June 23, 1983, Brummett received another letter from the Bank's lawyer stating that since the note had not been paid, that the Bank had elected to turn over collection of the note to the District Attorney's office. On that same day, Brummett received a letter dated June 22, 1983, from then Johnson County Attorney Dan Boulware (Boulware was a major stockholder in the First State Bank of Cleburne) stating that Brummett could appear before the Johnson County, Texas Grand Jury on June 30, 1983. Up to this point no one associated with First State Bank of Cleburne had ever suggested that Brummett may have violated any criminal law.

In his complaint Brummett alleged that on or about June 22, 1983, Jimmy Campbell (President of the First State Bank of Cleburne, Texas), Boles and Sanders, County Prosecutor Boulware and Johnson County District Attorney MacLean, acting on behalf of themselves and the First State Bank of Cleburne and Johnson County, Texas, entered into an illegal agreement to cause Brummett to be illegally arrested and maliciously prosecuted for failure to repay his loan to the First State Bank. (District Attorney MacLean sat on the Bank's board of directors and was at the board meeting when the decision was made to refer Brummett to the Grand Jury.) Brummett alleged that in furtherance of this illegal agreement, each of the petitioners agreed that the Johnson County Grand Jury would be purposely misled to believe that respondent had committed a violation of Article 32.33 of the Texas Penal Code, when Brummett had not violated this law. In order

to be convicted of the indictment brought against Brummett pursuant to Texas Penal Code Article 32.33, there had to be evidence that Brummett had the intent to hinder the enforcement of the Bank's security interest and that Brummett had moved part or all of his inventory to another state. There was no evidence that the respondent had intentionally hindered the enforcement of the Bank's security interest, nor was there evidence that he had secreted or moved any of his inventory to another state.

After consulting with a lawyer, Brummett's lawyer advised him to go to the Grand Jury and explain that no crime had occurred. On June 30, 1983, respondent arrived at the Grand Jury meeting room at 8:30 a.m. but he was not called before the Grand Jury until 8:00 p.m. While Brummett was waiting to be called, Sanders (the Bank Vice President) arrived at around 7:30 p.m. Brummett observed Sanders go into the District Attorney's office and Sanders was followed by District Attorney MacLean. Shortly thereafter County Prosecutor Boulware, in the company of another individual, went into MacLean's office. These individuals were together approximately thirty minutes when Prosecutor Boulware came out of the District Attorney's office and entered the Grand Jury meeting room. Brummett was then called before the Grand Jury.

In the Grand Jury room, Prosecutor Boulware, directed Brummett to sit down and he was then placed under oath. Boulware stated that a complaint had been filed by the First State Bank of Cleburne against Brummett which alleged that Brummett had sold mortgaged property in excess of $10,000 without the knowledge or consent of petitioner First State Bank of Cleburne. Boulware showed Brummett a copy of the note and asked if he had signed it. Brummett replied that he had indeed signed it. Boulware then showed Brummett his original inventory sheet dated January, 1982, and asked him if he recognized it as the inventory mentioned in the note. Brummett replied yes. Boulware then asked

if Brummett had sold this inventory. Brummett replied yes. Boulware then told the grand jurors they could ask Brummett questions. Several questions were directed to Brummett, then some of the grand jurors stated that they felt that Brummett had done nothing wrong. One juror stated, "We don't think you're a criminal, Jay." Brummett then asked why, if that was the case, he was there before the Grand Jury. Brummett told the jurors that apparently he was being accused of selling his inventory in the normal course of business, but this was clearly the understanding that he and the Bank had. Brummett then told the Grand Jury that any statement that he did not have the Bank's consent or that the Bank did not have any knowledge that he was selling his inventory simply was not accurate or true. At this point, Boulware held up the loan papers in front of Brummett and loudly stated, "O.K., Jay, let's get the facts straight. You mortgaged property, you sold it, you admit it, and that puts you right in the middle of this statute, and that's the facts." The jurors asked Brummett if he had an agreement with the Bank to keep a certain amount of inventory. Brummett replied no, which appeared to Brummett to surprise the grand jurors. Brummett told them that he had kept current inventories and books, that the Bank had been free to examine them at any time, and that he would have gladly sent the Bank monthly inventory sheets and statements if the Bank had ever asked for them, but the Bank had not. At this point a juror said, "Maybe we had better get the banker back in here." Brummett was excused, and sat down in the hall outside the grand juror's meeting room. A man then came out of the Grand Jury room, went into the District Attorney's office and came out with petitioner Sanders, and went back into the Grand Jury room. Several minutes later, Prosecutor Boulware stuck his head out of the door to the Grand Jury meeting room and told Brummett that he could go home and that they would let him know what happened.

Later Brummett talked with one of the grand jurors. This

juror said that the Grand Jury had been very reluctant to indict him and that the Grand Jury had passed a resolution stating that the Grand Jury did not feel Brummett had violated the law with any criminal intent. The juror also said that the Grand Jury had asked Prosecutor Boulware, to notify Brummett of this resolution, and that Boulware had assured the Grand Jury that he would. The grand juror stated that the Grand Jury was never told anything concerning Brummett taking any of his inventory outside the State of Texas. This resolution was never delivered to Brummett.

On July 1, 1983, Brummett was notified that the Johnson County Grand Jury had indicted respondent on June 30, 1983, for a felony under Article 32.33 of the Texas Penal Code. Because of this indictment, Brummett was arrested, taken into jail, fingerprinted and photographed. (The decision of the Court of Appeals for the Fifth Circuit was incorrect in stating that Brummett was not incarcerated.) After almost three years of court appearances where Brummett was each time threatened with incarceration if he did not repay the loan, the charge was ultimately dismissed on April 7, 1986 on a motion of the Assistant District Attorney for the stated reason that "insufficient evidence" existed for the prosecution of respondent. Thus the prosecution terminated in respondent's favor on April 7, 1986.

Shortly after Brummett was indicted, he filed for bankruptcy. None of the petitioners contested discharge of Brummett's debt to the First State Bank of Cleburne.

REASONS FOR DENYING THE WRIT

I.

THE LIMITATIONS PERIOD FOR A 42 U.S.C. § 1983 ACTION CAN ONLY BEGIN TO ACCRUE WHEN THE UNDERLYING CRIMINAL PROCEEDING HAS TERMINATED IN FAVOR OF THE PLAINTIFF.

As with any civil claim, one must determine the appropriate period of limitation for bringing a malicious prosecution action. To accomplish this, it is necessary to conduct a two-prong analysis and consider both the time at which the limitation period begins to run and the duration of time in which the plaintiff may properly bring his action. An examination of the elements of the action and at which point in time all of the required elements could be present is necessary in order to determine the time at which the statute of limitations clock begins to run.

> At common law the tort of malicious prosecution has four elements: (1) a criminal proceeding initiated or continued by the defendant against the plaintiff; (2) termination of the proceeding in the plaintiff's favor; (3) absence of probable cause; and (4) a primary purpose in prosecuting plaintiff other than bringing him or her to justice.

W. Prosser & W. Keeton, *Law of Torts*, 871 (5th Ed. 1984).

The various courts of appeal appear to agree that malicious prosecution has four elements: (1) the defendant must be found to have instituted a criminal action against the plaintiff; (2) the prosecution must have ended in the plaintiff's favor; (3) there must have been insufficient probable cause to initiate the criminal proceeding; and (4) the defendant must have acted maliciously.

See Dellums v. Powell, 566 F.2d 167, 191 (D.C. Cir. 1977); *Sullivan v. Choquette*, 420 F.2d 674, 676 (1st Cir. 1969); *Jennings v. Shuman*, 567 F.2d 1213 (3rd Cir. 1977); *Wheeler v. Cosden Oil & Chemical*, 744 F.2d 1131 (5th Cir. 1984).

Even though the elements of common law malicious prosecution and those elements as recognized by United States courts of appeal may differ slightly there is universal agreement that the criminal prosecution must terminate in favor of the plaintiff. The requirement that the criminal proceeding must terminate in the plaintiff's favor manifests at the point when the plaintiff (defendant in the criminal procceeding) has been either acquitted of the criminal charges which are the basis of the claim or at the point that those criminal charges are dismissed. The Court of Appeals for the Fifth Circuit rightly concluded:

> In order to sustain [a] . . . conclusion that a malicious prosecution claim under § 1983 accrues prior to favorable termination of the underlying criminal proceeding, one of two propositions must be true: (1) favorable termination is not an element of a § 1983 malicious prosecution claim; or (2) a § 1983 claim may accrue *before* all of its elements are established.
>
> . . .[T]he federal courts have adopted the common law rule that termination of the underlying criminal proceeding in favor of the accused is an essential element of a § 1983 malicious prosecution claim. *See e.g., Torres v. Superintendent of Police*, 893 F.2d 404, 409 (1st Cir. 1990); *Rose v. Bartle*, 871 F.2d 331, 349 (3rd Cir. 1989); *McCune v. City of Grand Rapids*, 842 F.2d 903, 907 (6th Cir. 1988); *Venegas v. Wagner*, 704 F.2d 1144, 1146 (9th Cir. 1983); *Singleton v.*

> City of New York, 632 F.2d 185, 198 (2d Cir.1980), cert. denied, 450 U.S. 920, 101 S.Ct. 1368, 67 L.Ed 2d 62 (1981); *Morrison v. Jones,* 551 F.2d 939, 940-41 (4th Cir. 1977); *Sullivan v. Choquette,* 420 F.2d 674 (1st Cir. 1969), cert. denied, 398 U.S. 904, 90 S.Ct. 1691, 26 L.Ed.2d 62 (1970).

Brummett v. Camble, 946 F.2d 1178 (5th Cir. 1991) (emphasis added).

Considering that the criminal proceeding must terminate in favor of the plaintiff in a malicious prosecution action, the clock on the period of limitation could only begin to run at the point of termination of the criminal proceeding. In this case the criminal charges against Brummett were dismissed for insufficient evidence on April 9, 1986. Therefore the time at which a statute of limitations would begin to run could only be April 9, 1986.

The Court of Appeals reference to the common law is on solid ground because this Court since *Monroe v. Pape,* 365 U.S. 167, 81 S. Ct. 473 (1961) has repeatedly stated that § 1983 litigation should be read against the "background of tort liability." In addition, since *Monroe v. Pape,* this Court has said that when making the determination of the appropriate statute of limitations the courts should rely on the state's statute of limitations for the analogous tort. This however gave rise to uncertainties as to which tort the § 1983 action was most closely aligned. In an attempt to establish uniformity in the statute of limitations in § 1983 actions, this Court in *Wilson v. Garcia,* 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985), thoroughly analyzed the existing uncertainties inherent with the broad charaterization of § 1983 claims as being analogous to common law tort claims. This Court determined that § 1983 claims were actually injuries to the person and that the state's statute of limitations for personal injuries would be the statute of limitations for § 1983 actions. *Wilson*

at 471 U.S. 276-79, 105 S. Ct. 1938-39.

The Texas statute of limitations for personal injuries and the one applicable in light of this Court's holdings in *Wilson v. Garcia* is two years. Tex. Civ. Prac. & Rem. Code Ann. § 16.003 (Vernon 1986). Had not this issue been previously settled by this Court, the reliance may have been placed on the Texas statute of limitations specifically provided for malicious prosecution. The Tex. Civ. Prac. & Rem. Code Ann. § 16.002 (Vernon 1986), provides for a one year limitation period for a plaintiff to file a malicious prosecution claim.[1] Considering that the dismissal of the criminal proceedings against Brummett on April 9, 1986 and that on March 26, 1987 Brummett filed his claim, Brummett's complaint was filed within both the Texas one year statute of limitations for malicious prosecution and within the Texas two year statute of limitations for personal injury claims.

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1. Texas law regarding the time the statute of limitations begins to run has been well settled since *Von Koehring v. Witte,* 40 S. W. 63 (Tex. Civ. App. 1887). The question was again laid to rest in *Browning v. Pay-Less Self Service Shoes, Inc.,* 373 S.W. 2d 71 (Tex. Civ. App. 1963) where the court found:

> An essential element of a cause of action for malicious prosecution is a showing that the criminal prosecution has terminated favorably to the plaintiff. Only upon such successful termination does a cause of action for malicious prosecution arise.

II.

NEITHER THE DISTRICT COURT NOR THE COURT OF APPEALS ADDRESSED ANY ISSUES OTHER THAN THE STATUTE OF LIMITATIONS AND THE IMMUNITIES OF THE PARTIES NOT SEEKING CERTIORARI, ANY OTHER ISSUES ARE IMPROPERLY PRESENTED TO THIS COURT FOR APPELLATE REVIEW.

On December 21, 1988, petitioners Campbell, Boles, Sanders and the First State Bank moved for summary judgment. Petitioners had suggested several reasons why they were entitled to summary judgment, but the District Court only responded to their claim that the matter was filed beyond the limitations period and ordered the cause dismissed on June 4, 1990 (Petitioner's Brief, Appendix A-23).

Respondent appealed the District Court's summary judgment and on November 14, 1991, after oral argument, the United States Court of Appeals for the Fifth Circuit, found that the District Court had erred in applying the standards for determining the statute of limitations for a malicious prosecution action and additionally found that the District Court had improperly dismissed the petitioners as defendants. The resulting holding of the Court of Appeals was to *affirm* the District Court's judgment dismissing Boulware and MacLean on the basis of their immunity; *vacate* the trial court's judgment dismissing Johnson County; and *remanded* the case for proceedings consistent with that opinion.

Here, petitioners have ignored fundamental American jurisprudence. Petitioners seek to raise four issues for this Court's review. With the exception of the questions regarding the statute of limitations issue, no other issues raised by them have been decided by the District Court nor the Court of Appeals. To review these issues at this time would in essence require a *de novo*

determination and result in a determination of a summary judgment issue that neither the District Court or the Court of Appeals considered. The petitioners also appear to claim that they presented a challenge to the viability of malicious prosecution to the Court of Appeals. This was not done.

III.

RESPONDENT'S CAUSE OF ACTION RESULTED FROM PETITIONERS' DEPRIVATION OF RIGHTS GUARANTEED HIM BY THE CONSTITUTION.

In their zeal to convince this Court to grant certiorari, petitioners have overlooked several important details. Firstly, petitioners have failed to appreciate that *Baker v. McCollan*, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979) was complied with and inform this Court that Brummett's 1983 claims are bottomed on fundamental constitutional principles. The petitioners/bank officers, etc. in conjunction with their Bank associated prosecutors, initiated a prosecution devoid of "probable cause." In order to legitimately and honestly charge and/or convict Brummett of the indictment they brought against him, they needed evidence that Brummett had intentionally hindered the enforcement of a creditor's security interest and had taken the "inventory" pledged to the loan outside of Texas. This is because the indictment and Texas Penal Code Art. 32.33 required the prosecutor to prove that Brummett had the intent to hinder the enforcement of the Bank's security and that a "removal" had occurred. In the context of the indictment and the statute, "Remove" would mean that Brummett took his inventory out of the State of Texas. There was no evidence that Brummett moved any of his inventory outside Texas. Further, "inventory" by its very nature are goods offered for sale to third parties. The Bank/petitioners knew that Brummett was selling his "inventory" and placed no restrictions on his sale of the inventory. Therefore,

they were never in any position to claim that Brummett violated Texas Penal Code Art. 32.33.

Secondly, the petitioners, in conjunction with the prosecutors, misled the Grand Jury as to the true meaning of Penal Code 32.33. A judge undoubtedly would have required evidence of "Removal" but a Grand Jury of laymen not schooled in the law or of the meaning of probable cause were forced to rely upon a prosecutor(s) associated with the Bank to make a judgment on the prosecutor's misstatement of the law.

This Court has held in *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986) that a police officer who misleads a court as to the existence of probable cause is liable to the persons named or affected by the execution of his warrant. That same principle should equally apply to persons who cause a prosecution in the absence of probable cause to occur. Clearly, the Fifth and Fourteenth Amendment due process clauses, as well as the Fourth Amendment requirement for probable cause, protects against a deprivation of liberty such as the one presented herein. When a citizen is prosecuted, his liberty is clearly subjected to jeopardy and this would invoke Fifth and/or Fourteenth Amendment protection. The due process clause was intended to secure an individual from an abuse of power by government officials. *See e.g., Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986); *Baker v. McCollan*, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979); *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975). Therefore, contrary to the petitioner's claims, Brummett's § 1983 malicious prosecution claims are based on constitutional principles. Fifth and/or Fourteenth Amendment "due process" as well as absence of Fourth Amendment "probable cause" provide ample constitutional basis for Brummett's claims. Brummett's prosecution could not have been accomplished without the

misstatement of the law and the absence of probable cause by the prosecutors.

A Grand Jury indictment is in effect a finding of probable cause and the issuance of a *capias* warrant based on an indictment is nothing more than a ministerial act of the clerk of the court where the indictment is filed. Therefore, the persons who stand in the position of establishing probable cause are in the same "stead" as those who present a "warrant" to a judge not bottomed on probable cause. *See Malley v. Briggs, supra. See also, Franks v. Delaware,* 438 U.S. 154, 98 S. Ct. 2694, 57 L. Ed. 2d 667 (1978). In *Franks v. Delaware*, this Court recognized that the Fourth Amendment was violated when false information is presented to a "Magistrate" to obtain a warrant. Reading *Malley v. Briggs* and *Franks v. Delaware* together, as well as recognizing that the "due process" clause was intended to secure an individual from an abuse of power by "government" officials can lead but to one conclusion, the Constitution protects an individual against an unconstitutional prosecution. *See also, Daniels v. Williams, supra.*

IV.

THE VARIOUS FEDERAL COURTS RECOGNIZE THAT THE COMMON LAW TORT OF MALICIOUS PROSECUTION IS ACTIONABLE UNDER 42 U.S.C. § 1983 WHEN A CITIZEN'S CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED BY THAT MALICIOUS PROSECUTION.

Numerous decisions of this Court recognized that a prosecution can violate the Constitution. *Dombrowski v. Pfister*, 380 U.S. 479, 85 S. Ct. 1116 (1965); *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971). As shown below the Circuit Courts also recognize that prosecution can be violative of constitutional rights and be actionable under 42 U.S.C. § 1983. The only real

disagreement between the Circuits as to when malicious prosecution is actionable under § 1983 appears to be the level of egregious conduct on the part of a defendant who offended the plaintiff's constitutional rights. Brummett's § 1983 malicious prosecution action arose as a result of petitioners' invoking the criminal process without probable cause which denied him his rights to due process and resulted in criminal prosecution for reasons other than to punish a person for a criminal act. At no time had Brummett attempted to secretly dispose of the inventory of the "Stereo Center" or to hide that inventory in or out of the State of Texas. Nonetheless petitioners used criminal process for purposes other than those the statute (Tex. Pen. Code Ann. Art. 32.33) was intended and for the purpose of inducing payment on a debt, that because of Brummett's bankruptcy, could not be collected in civil court.[2] Petitioners' acts operated to trigger Brummett's protections under the Fourteenth Amendment whereby a person is guaranteed freedom from bad faith prosecution and abuse of process by government officials and which made petitioners' conduct actionable under § 1983. *Dombrowski v. Pfister*, at 380 U.S. 490, 85 S. Ct. 1123. "The due process clause of the Fourteenth Amendment was intended to prevent government from abusing [its] power, or employing it as an instrument of oppression." *Collins v. City of Harker Heights*, 112 S. Ct. 1061, 1992 U.S. Lexis 1376, 117 L. Ed. 2d 261, 60 U.S.L.W. 4182 (1992). Petitioners' use of criminal process to coerce Brummett's compliance with their demands is an egregious act which constitutes a denial of due process and is actionable under § 1983. *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423, 1431 (10th Cir. 1984).

The Johnson County District Attorney and the County

2. *See In Re Seidelman, Bankruptcy*, 57 B.R. 149 (D. Md. 1986), where Bankruptcy Court entered injunction prohibiting the Texas prosecution of a debtor under Texas Penal Code art. 32.33 where creditor initiated criminal prosecution in bad faith and in retaliation for debtor filing bankruptcy.

Prosecutor presented to the Grand Jury false information provided them by petitioners which the petitioners and the District Attorney and the County Prosecutor knew did not give rise to probable cause necessary to prosecute Brummett under the Texas criminal statute.

The indictment returned against the respondent on June 22, 1983 and then dismissed on April 9, 1986, stated as follows:

> IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS
>
> The Grand Jurors for the County of Johnson, State of Texas, duly selected, impaneled, sworn, charged and organized as such at the January Term, A.D., 1983, of the 249th Judicial District Court of said County, upon their oaths present in and to said Court, that JAY BRUMMETT, on or about the 22nd day of June, A.D. 1983, and before the presentment of this indictment, in said County and State, did then and there intentionally and knowingly signed a security agreement which created a security interest in property, namely, stereo equipment, did then and there, with intent to hinder enforcement of such security interest, remove the property;
>
> AGAINST THE PEACE AND DIGNITY OF THE STATE.
>
> s/ Benson Shuhorn
> Foreman of the
> Grand Jury

The conduct of the petitioners as well as the District Attorney

and the County Prosecutor injured Brummett by obtaining that indictment by knowingly providing the Grand Jury both false information and misleading information concerning probable cause.

> If . . . the Fourteenth Amendment imposes a duty on state prosecutors to charge [criminal wrongdoing] only upon ascertaining probable cause, it follows that one acting under state authority . . . can be liable for subterverting the performance of that duty, as by maliciously tendering false information to the prosecutor which leads him to believe probable cause exists where there is none. Since this would violate federally guaranteed rights, it therefore can be grounds for a § 1983 action.

Wheeler v.Cosden Oil Co., 734 F.2d 254 (5th Cir. 1984).

> The defendant may be liable for either initiating or for continuing a criminal prosecution without probable cause. . . .[I]f he advises or assists another person to begin the proceeding, ratifies it when it is begun in his behalf, or takes an active part in directing or aiding the conduct of the case, he will be responsible.

Hampton v. Hanrahan, 600 F.2d 600, 630 (7th Cir. 1979); Prosser, Torts (4th ed. 1971) pp. 836-37. *See also, Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), considering prosecutorial misconduct.

Regardless of whether petitioners were responsible directly or indirectly for causing Brummett's malicious prosecution, a private citizen, acting in concert with public officials, is liable under

§ 1983. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); *Dennis v. Sparks*, 449 U.S. 24, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980).

The absence of probable cause is an essential element of an action for malicious prosecution. *Banish v. Locks*, 414 F.2d 638, 640 (7th Cir. 1969). Here petitioners rely on the Grand Jury indictment to claim the Grand Jury found probable cause and that Brummett's Fifth and Fourteenth Amendment rights to due process were not violated.[3] However, even where an indictment is obtained by an improper finding of probable cause and is tainted by the malicious actions of government officials, that indictment is not enough to insulate the state actor against malicious prosecution under § 1983. *Hand v. Gray*, 838 F.2d 1420 (5th Cir. 1988). "It is clear that the filing of [criminal] charges without probable cause and for reasons of personal animosity is actionable under § 1983." *Losch v. Borough of Parkesburg, Penn.*, 736 F.2d 903, 907 (3d Cir. 1984); *Inada v. Sullivan*, 523 F.2d 485, 487-88 (7th Cir. 1975). ". . . [A]ny of the pretestimonial acts that may have undermined the federally guaranteed right to be free of malicious prosecution can form the basis of a § 1983 action." *Strength v. Hubert*, 854 F.2d 421, 426 (11th Cir. 1988).

"For procedural due process purposes in a claim of malicious prosecution, the plaintiff usually must show the alleged conduct deprived him of liberty by distortion and corruption of the process of law, *i.e.*, corruption of witnesses, falsification of evidence, or some other egregious conduct. . ." *Torres v. Superintendent*

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3. The Johnson County Grand Jury passed a resolution that the Grand Jury did not feel that Brummett had any criminal intent. In addition the Grand Jury was never presented any evidence that inventory was removed from Texas. The Grand Jury asked County Prosecutor Boulware to notify Brummett and/or his attorney of the resolution. Neither Brummett nor his attorney were advised by Boulware or any other Johnson County official of the Grand Jury resolution.

of Police of Puerto Rico, 893 F.2d 404, 410 (1st Cir. 1990); *Dunn v. State of Tenn.*, 697 F.2d 121, 125 (6th Cir. 1982). Brummett properly alleged in his complaint that petitioners caused him to be incarcerated and caused him the anguish and expense of defending himself in court for almost three years because of the criminal indictment brought against him. ". . .[His] deprivation of liberty without 'reasonable cause' is a section 1983 violation as to which the defendant bears the burden of proving reasonableness, and a subjective good faith belief in the legality of the arrest [and prosecution] is not enough. . ." *Raysor v. Port Authority of New York and New Jersey*, 768 F.2d 34, 40 (1985).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari filed by the petitioners Jimmy Campbell, *et al.* should be denied.

Respectfully submitted,

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